

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Workers Compensation Fund is absolved of liability.

The question in this proceeding is whether a Form 88 filed with the director's office on behalf of the respondent established knowledge on the part of the respondent that claimant had a preexisting impairment that constituted a handicap. Respondent contends the document establishes a presumption that it had knowledge of a preexisting impairment and a presumption that respondent had knowledge that claimant was a handicapped employee before the accidental injury on September 28, 1989.

Before liability may properly be assessed against the Workers Compensation Fund, the respondent must show it either had knowledge of the employee's handicap or the employee knowingly concealed his impairment. See K.S.A. 1989 Supp. 44-567(a) and (c). By filing proper notice with the director, the respondent can create a presumption that it had knowledge of the preexisting impairment. See K.S.A. 1989 Supp. 44-567(b) which provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. *If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment.* If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes the existence of a reservation in the mind of the employer when deciding whether to hire or retain the employee." (Emphasis ours.)

The Division of Workers Compensation created the Form 88, Notice of Handicap, Disability or Physical Impairment, for parties to utilize to provide the notice referred to in K.S.A. 1989 Supp. 44-567(b). However, as indicated by the statute, the timely filing of the Form 88 creates the presumption of knowledge of the pre-existing impairment only. It does not create a presumption that the condition described in the Form 88 renders the employee handicapped. In order to constitute a handicap, an impairment must be a condition or disease of such character it constitutes a handicap or hindrance in obtaining or retaining employment. See K.S.A. 44-566. Not all impairments constitute handicaps under K.S.A. 44-566. Even those diseases or conditions specifically listed in that statute must be of such severity and character to interfere with obtaining or retaining employment.

The Form 88 filed on behalf of respondent in this case describes claimant's impairment as "spinal/lumbar muscle strain." Although there are records and testimony from several physicians regarding treatment claimant received before and after his accidental injury on September 28, 1989, which is the subject of this proceeding, neither claimant nor representatives from respondent testified. The description of the Form 88 is not one listed in K.S.A. 44-566, nor does it provide insight into the severity of claimant's described condition, or any other information to judge the effect upon claimant's ability to obtain or retain employment.

The Appeals Board finds the filing of the Form 88 created the presumption that respondent had knowledge of a preexisting condition involving the lumbar muscles. However, that evidence is insufficient to establish that claimant's condition handicapped him from obtaining or retaining employment or that respondent had knowledge that claimant was handicapped. Whether a particular impairment is of such nature as to

constitute a handicap within the meaning of K.S.A. 44-566 is a question of fact. See Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448.

The medical evidence likewise fails to support respondent's claim against the Workers Compensation Fund. Although Dr. Black testified claimant had some type of symptomatic low back condition before the accident of September 1989, his opinion is of little weight as it was based upon a review of an incomplete set of medical records. On the other hand, two physicians who have treated claimant since 1987 and who have a more complete knowledge of claimant's medical history testified that claimant's September 1989 back injury was not related to a preexisting back problem for which claimant had sought treatment.

The Appeals Board finds the medical evidence is overwhelming that claimant did not have an impairment to his lower back that constituted a handicap in his obtaining or retaining employment. Therefore, even if the filing of the Form 88 did create a presumption that respondent possessed knowledge of a handicap, a contention with which we expressly disagree, such presumption would be overcome by the testimony and records of Dr. Roger R. Tobias, Dr. Scott L. Stringfield and Dr. Robert A. Rawcliffe.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson entered in this proceeding on September 29, 1994 should be, and hereby is, reversed; that the Workers Compensation Fund is absolved of liability in this proceeding and that the respondent, American Salt Corporation, and its insurance carrier, Liberty Mutual Insurance Company, are responsible for the entirety of the Award. The costs of this proceeding are hereby assessed against the respondent and the insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of August 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: Douglas D. Johnson, Wichita KS
Vincent L. Bogart, Wichita KS
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director